

BOOK REVIEW

WITHOUT GUILT AND JUSTICE: FROM DECIDOPHOBIA TO AUTONOMY. BY WALTER KAUFMANN. New York: Peter H. Wyden, Inc., 1973. Pp. xiii, 274. \$7.95.

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The portions of Professor Kaufmann's book which are of particular interest to lawyers, legal philosophers and political theorists are, I think, the passages in which he discusses justice, guilt and equality. Although these topics—or at least the first two of them—are picked out for emphasis in the title of the book, they are in an important sense merely incidental elements in a discussion which moves beyond them.

The main theme of the book is moral autonomy, as distinguished from legal or political autonomy. Professor Kaufmann has not set out to write on political theory or legal theory, nor is he concerned with the sociology of law or government. He is concerned with liberation of the mind from certain psychological and intellectual fetters which, in his view, have prevented us from achieving our full potential as responsible human beings. His intentions are made clear in the first two paragraphs of his short preface:

To those whose minds are not liberated, wars, revolutions, and radical movements will never bring freedom but only an exchange of one kind of slavery for another. That is one of the most tragic lessons of the twentieth century.

Liberation of the mind is no panacea, but without it angry rhetoric and cruel bloodbaths are of no avail, and tyranny endures. Most of those who see themselves as radicals and revolutionaries still cling to decrepit ideas like justice and equality and depend on guilt and fear, as our fathers and mothers did. What we need is a new autonomous morality.¹

As this passage makes plain, Professor Kaufmann considers that conventional views—or what he takes to be conventional views—on justice, guilt and equality are incompatible with a truly autonomous morality. The controlling assumption is that if we

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¹ W. KAUFMANN, WITHOUT GUILT AND JUSTICE: FROM DECIDOPHOBIA TO AUTONOMY vii (1973). [hereinafter cited as KAUFMANN].

understand what an autonomous morality would be, we can hope to overcome the psychological and intellectual obstacles which prevent its achievement. Among such obstacles are certain moral and legal preoccupations, including those mentioned. Such an approach makes it unnecessary to consider the sort of problems considered by jurists and legal philosophers like Austin, Holmes, Gray, Llewellyn, Frank, Kelsen, Perelman, Lon Fuller, H.L.A. Hart or Roscoe Pound, none of whom are mentioned. One assumes (though Professor Kaufmann does not explicitly say so) that all such writers are mired in old legalities and moralities which fail to liberate the mind. By contrast, Professor Kaufmann sketches a "new integrity" rooted in autonomy, claiming that, "Now autonomy appears as the goal of a historical development: the autonomous man is the modern counterpart of 'the just man' of the ancient Greeks and Hebrews. He does not bow to authority; he decides for himself."² Thus we move toward new horizons. It should be added, however, that Professor Kaufmann does not accept the "new integrity" simply because it is new or because he regards it as the product of an historical determinism; he explicitly rejects wave-of-the-future thinking and discounts historical determinism. He values the "new integrity" because he considers it appropriate and necessary to modern conditions.

Professor Kaufmann's conception of moral autonomy deserves attention because it is original and important. I am not sure that it has all the implications and consequences which Professor Kaufmann claims for it, but in order to consider this question it is necessary first to make clear, at least in outline, what his conception of autonomy is. Instead of identifying autonomy broadly with freedom to do whatever one wants (he is no anarchist) or with freedom to choose whatever one desires (he rejects hedonism) or with the rational capacity of the individual to prescribe to himself universal laws by which to test the validity of particular choices and decisions (he rejects all forms of Kantianism), Professor Kaufmann identifies autonomy with a certain mode or style of decisionmaking. In this respect, his position has something in common with that of certain existentialists. However, Professor Kaufmann explicitly rejects the view (associated with Heidegger) that resoluteness of choice is itself the mark of authenticity, since on that theory a blind decision to accept authority, such as a firm resolve to follow Hitler, would stand as an expression of autonomy. "Autonomy," Professor Kaufmann says at the outset, "consists of making with open eyes the decisions that give shape to one's life."³ Autonomy is involved in

² *Id.* 180.

³ *Id.* 2.

"fateful" decisions, as distinguished from trivial decisions. Having open eyes means (as he develops his view, especially in the later chapters of his book) being guided by certain canons of rationality and intellectual honesty in making fateful decisions. There are certain "imperatives" of rationality⁴ which demand not only that all questions of *meaning* should be faced—the autonomous man is not misled by clichés and slogans—but also that all the alternative possibilities and their consequences should be carefully explored and all preconceptions examined. The autonomous decisionmaker stands on his own feet, resisting the pressures of authority and conformity (including the conformities of militant nonconformists), and faces courageously the risks and uncertainties which are implicit in all crucial decisions. In a world which he knows to be "capricious and cruel,"⁵ he accepts the fact that autonomy is unlikely to bring happiness (at least in the conventional sense of "happiness"). He also recognizes that some degree of "alienation" or estrangement is not only inevitable but necessary for any sort of creative achievement. "What people really desire most," asserts Professor Kaufmann, "is to live creative lives."⁶ He concedes that this claim cannot be proved, but is nevertheless convinced that all individuals are potentially creative. And moral autonomy, as he conceives it, is a form of creativity.

Such a rough and summary sketch scarcely does justice to Professor Kaufman's conception of autonomy, but it may serve to show that he puts forward an ideal model of rational, honest and courageous decisionmaking and holds that one achieves autonomy by conforming to that model. Some characters in history and fiction are cited as exemplars, including Prometheus, Clytemnestra, Socrates, Goethe, Eleanor Roosevelt and, most notably in our own times, Alexander Solzhenitsyn, to whom the book is dedicated. (Nietzsche is also included in the list but apparently for his views rather than for his actual life.) Clearly Professor Kaufmann is not an irrationalist. He rejects "moral rationalism" because he thinks it makes moral decisionmaking too cut-and-dried; it discounts the quandaries and the "dizziness" of moral struggle by ascribing to reason a power which it does not possess. But rationality has nevertheless an important role in moral decisions: it helps us to avoid bad decisions and commitments.⁷

As I have already suggested, I think Professor Kaufmann's conception of moral autonomy has much to recommend it. He

⁴ See *id.* 178.

⁵ *Id.* 129.

⁶ *Id.* 224.

⁷ See *id.* 190 *et passim*.

cuts through many tangles and explodes many fashionable misconceptions, such as those surrounding the concept of *alienation*. He is entirely right, I think, in claiming that honesty means more than sincerity and that there is something fundamentally dishonest about blind commitments of any sort, even a commitment to a cause which is good. He is also correct, I think, in insisting that, while autonomy is a necessary condition of virtue, it is not a sufficient condition since the autonomous person might still be a monster of cruelty if he lacks love and compassion. These points, and many others, are excellently made. It remains to consider whether his views about guilt, justice and equality are equally persuasive. I do not think they are. It seems to me that even if one subscribes to his conception of moral autonomy, one cannot dispense with the concepts of justice, equality and guilt, and that Professor Kaufmann has on these points misconceived the issues.

It is important first to notice the manner in which Professor Kaufmann has approached these issues, because his procedure seems to invite certain confusions. He does not begin (as I have done) by expounding his views on autonomy at the outset. Had he done so, he would then have been in a position to indicate clearly what obstacles stand in the way of our achieving the kind of autonomous morality which he envisions. Generally, one needs to understand what one is seeking in order to understand what to avoid. Professor Kaufmann has proceeded in the opposite direction. He begins his book by discussing the obstacles to autonomy, on the theory that by knowing what to avoid we can learn what we are to seek.⁸ The reader is told in the first chapter that if we are to achieve autonomy, the main danger to be avoided is something called *decidophobia*. What is decidophobia? It is defined as fear of autonomy. ("The fear of autonomy is a nameless dread, which leaves me free to coin a name for it: *decidophobia*."⁹) Thus the reader is enmeshed in a puzzling kind of circularity. He does not yet know what autonomy is, except that it is claimed to be the object of a special kind of fear, hitherto unrecognized and nameless, to which the author has elected to give a name. How is the reader to detect the existence of this newly recognized fear? Only by observing that it operates to destroy autonomy.

The puzzle is not resolved by Professor Kaufmann's ensuing account of the ten "strategies" of decidophobia, since the supposed "strategies" turn out to be sometimes compatible with autonomy. The first "strategy" of decidophobia is specified as religion, but the author concedes that allegiance to a religion is

⁸ "The first chapter explains the meaning of autonomy by showing what lures and strategies must be resisted to achieve it." *Id.* vii.

⁹ *Id.* 3.

not always prompted by decidophobia.¹⁰ At least several of the other supposed "strategies" of decidophobia, such as allegiance to a movement, allegiance to a school of thought, and marriage, are on the same footing. Their status is thus ambiguous. One does not learn what autonomy is or what decidophobia is by considering activities that might be prompted by motives having nothing to do with autonomy.

Consider, for example, allegiance to a "school of thought." It is coming to be recognized that thinking never occurs in a vacuum, but always in a context or framework involving certain underlying assumptions and presuppositions, most of which are accepted unconsciously. It seems that one of the most difficult and demanding of intellectual jobs is that of challenging the basic framework of ideas to which one is accustomed. Hence the resistance of scientists, for example, to radically new ways of conceiving the physical world.¹¹ Are we to say that decidophobia—*i.e.* fear of autonomy—is at work in such cases? It is not impossible. Yet other explanations seem at least equally plausible, ranging from professional jealousy to lack of imagination and sheer inability to grasp a new angle of vision.

Again, while it seems plausible to believe that someone who has actually experienced the pangs of moral or intellectual bewilderment might come to fear it and flee accordingly to the security of ready-made doctrine, it seems less plausible to suppose that someone who had never experienced such bewilderment should have the same fear. Yet Professor Kaufmann claims to find decidophobia operating the same way in both cases. He invokes it not only to explain why unhappy doubters reach for certainty, but also why those who have been brought up with certainties cling blindly to them. I think other explanations are more probable.

In short, I find the whole conception of decidophobia vague and problematical. The suspicion arises that it serves chiefly as a rhetorical device to stack the cards (somewhat illegitimately and quite unnecessarily) in favor of Professor Kaufmann's conception of autonomy. The word "phobia" not only carries an adverse connotation but it implies an object. If there is such a thing as autonomy-phobia in Professor Kaufmann's sense (which is what decidophobia amounts to), then there must be such a thing as autonomy in Professor Kaufmann's sense. I think the case would be stronger if decidophobia were left out. Since autonomy in Professor Kaufmann's sense is difficult to achieve, there are many possible reasons for falling short. Nothing is gained, as far as I can see, by postulating a special psychological fear of it. Why

¹⁰ *Id.* 8.

¹¹ *Cf.* T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

could we not as readily postulate a special fear of 'wisdom'—perhaps called *sophiaphobia*—to account for the existence of stupidity?

After discussing decidophobia, Professor Kaufmann moves on to justice and guilt, both of which are treated as obstacles to autonomy. His second chapter, entitled "The Death of Retributive Justice," opens as follows:

The road to autonomy is blocked by a two-headed dragon. One head is Guilt, the other Justice. Justice roars: "You have no right to decide for yourself; you have been told what is good, right, and just. There is one righteous road, and there are many unrighteous ones. Turn back and seek justice!"

Frightened, man stops and marvels at his own presumption, when Guilt cries: "Those who succeed in getting past Justice are devoured by Guilt. Seek the road to which Justice directs you and dare not to strike out on paths of your own." Guilt has a thousand eyes to swallow you, and the lids above and below each are lined with poison fangs. Turn back: autonomy is sacrilege.¹²

It is evident from the tone and content of these passages that Professor Kaufmann is condemning the concepts of justice and guilt largely because he associates them with authoritarian conceptions of law and morality. This association of ideas colors his analysis and severely restricts its scope.

When jurists, legal philosophers and political scientists discuss problems of justice, they are generally concerned with the validity of legal systems or particular kinds of laws. Under what circumstances and by what criteria, if any, might a legal system or a particular law be judged to be just? How are different systems of law or different types of legal enactments to be compared in respect of justice? In this context concepts of justice, far from presupposing the existence and validity of a repressive and authoritarian system, are invoked as a basis for questioning whether and how far authoritarian systems are acceptable. Of course concepts of justice vary. Positivists like Kelsen hold that the concept of justice is purely subjective, while others, like Lon Fuller and adherents of *natural law* or *natural rights*, consider that objective grounds can be found for it. Other views fall between the extremes. H.L.A. Hart, for example, while admitting a "minimum content" of natural law, propounds a generally positivistic theory of law though he rejects the view that

¹² KAUFMANN —.

laws are merely *commands*.¹³ Hart also believes (as reflected in his well-known debates with Lord Devlin) that the power of the state to regulate the private conduct of the individual should be restricted, and an active debate is continuing as to where the limits of public authority should be established.¹⁴ Such debates, of course, deal directly with the autonomy of the individual in its legal and political dimensions, *i.e.* with respect to the propriety of externally imposed limitations. Questions of justice figure prominently in discussions of this kind.

Professor Kaufmann ignores such discussions and virtually ignores the broader aspects and dimensions of the problem of justice with which they are concerned. He treats the concept of justice as if it were applicable only *within* a particular type of moral or legal system, specifically the authoritarian kind of system exemplified by the theologically based systems of the old Testament and the Middle Ages. He objects to the concept of justice largely because he views it as a consequence or byproduct of an authoritarian outlook. The truth is that the idea of justice, like the idea of natural law, can be invoked on both sides of that issue, depending on circumstances. It can be appealed to not only in support of authority and conformity but also to challenge authority and conformity. Professor Kaufmann sees, as it were, only one side of the coin. I suspect that this is due, in large measure, to his method of approach. He endeavors, as I have said, to expound his view of moral autonomy by means of a discussion of the obstacles to its achievement. Accordingly, justice is treated only in one dimension, *i.e. qua obstacle*.

The idea of justice, as Professor Kaufmann conceives it, is rooted in the concept of moral desert: "[J]ustice consists of meting out to men what they deserve."¹⁵ He does not tell us who, if anybody, thinks of justice in this way; he seems to assume that this is the obvious and prevailing interpretation. Against this conception of justice he puts forward three principal arguments. One is that since moral desert is incalculable, justice can never be achieved either in respect to punishments or distributions. (Retributive justice, as applied to punishments, and distributive justice, as applied to the allocation of goods and privileges, are the only aspects of justice which he considers.) The second argument is that the idea of retributive justice is "dead" and that the idea of distributive justice, its "Siamese twin"¹⁶ is moribund. The third argument—less clearly developed than the other two—is that the

¹³ See H.L.A. HART, *THE CONCEPT OF LAW* (1961).

¹⁴ See *e.g.*, H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); R. WASSERSTROM, *MORALITY AND THE LAW* (1971).

¹⁵ KAUFMANN 39 (emphasis in original).

¹⁶ *Id.* 66.

concept of justice is superfluous, since other concepts are available to serve all its necessary and legitimate purposes. I shall consider these contentions in order and then turn to certain incidental observations which Professor Kaufmann puts forward *en passant* but does not develop. I would suggest that some of the incidental observations are more significant than the main arguments, and that if they were followed up, different conclusions would emerge.

1. *The Problem of Moral Desert.* Professor Kaufmann contends that moral desert is incalculable; hence, justice can never be achieved in respect to either punishments or distributions. He does not conclude that punishments should be given up; on the contrary, he insists that punishments must be retained to make laws effective. He also concedes that distributions of goods and privileges must continue to be made. His contention is that we should cease talking about justice; we should accept the fact that punishments and distributions are necessary but that they can never be just. In effect, he contends that the concept of justice is empty. Hence it can serve no purpose except those of rhetoric and repression. This novel argument is arresting, but not, I think, persuasive.

Let us concede to Professor Kaufmann that perfect justice can never be done, and that we cannot even imagine an instance of perfect justice. Does it follow from this fact that the notion of justice is empty? I think not. Surely we can distinguish between better and worse without having to know what is best. If justice is susceptible to degrees, as I think it is, we need not know what the ideally just society would be in order to determine that certain kinds of laws and institutions are less just than other kinds.

As to the connection between justice and moral desert, it seems to me that the idea of moral desert is derived from the idea of justice, not vice versa. If so, the fact that desert cannot be precisely calculated on an absolute scale is a consequence of the fact that we have no idea of absolute and perfect justice. The idea of desert is always relative to some legal or moral system. Given a particular system of law or morals, we can say (at least approximately) what an individual deserves within that system. We can also judge whether the system, or certain aspects of it, including the conceptions of desert to which it gives rise, is more or less just than alternative systems. In brief, if there were some agreed system of absolute justice, we could derive from it an absolute scale for measuring moral desert. But lacking an agreed model of absolute justice, we also lack an absolute measure of desert.

To illustrate: Consider three systems of taxation, (a) a poll tax under which every citizen is required to pay a fixed sum, say

\$5, annually, (b) a flat-rate income tax under which every citizen is required to pay a fixed percentage of income, say 5%, annually, (c) a graduated income tax under which the poorest citizens pay nothing while richer citizens are required to pay at progressively higher rates as their incomes rise. In choosing among these systems, we can say with fair assurance, I think, that although none is perfectly just, the second is relatively more just than the first, and the third more just than the second, because greater account is taken of ability to pay. Can we say that any of these systems is *deserved*? I think not. But once any of these systems is adopted, we can say what each individual ought to pay under it, thereby fixing his *deserts* under the system in question. If he pays what he owes, he *deserves* all the privileges accorded to a law-abiding taxpayer; if he fails to pay, he *deserves* some sort of penalty.

I think Professor Kaufmann is wrong, therefore, in saying that "justice consists in meting out to men what they deserve." Justice under a given system may consist of treating men as they deserve under that system, but justice may also demand a modification of the system and a consequent alteration in the concept of what is deserved. It is worth noting in this connection that Professor Kaufmann makes no mention of the concept of obligation, although desert and obligation are closely related. I shall discuss this matter in connection with his theories about guilt.

2. *The Death of Retributive Justice*. In announcing the death of retributive justice, Professor Kaufmann seems to mean that the retributive theory of punishment is no longer taken seriously. It is true that some writers have rejected the retributive theory as barbaric and inhumane. However, other recent writers of considerable eminence have pointed out that the retributive theory must be taken seriously since it gives certain protection to individual rights which deterrence theories and rehabilitation theories do not provide.¹⁷ We should also note that in the *New York Times Magazine* for October 28, 1973, Professor James Q. Wilson, a political scientist writing on *The Death Penalty*, concludes after surveying the data that the deterrent effect of capital punishment cannot be proved or disproved by any kind of sociological investigations. Hence the basic issue must be one of justice. His final paragraph puts the matter as follows:

The main issue remains that of justice—the point is not whether capital punishment prevents future crimes, but whether it is a proper and fitting penalty for crimes

¹⁷ See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); H. PACKER, *supra* note 14.

that have occurred. That is probably as it should be, for such a question forces us to weigh the value we attach to human life against the horror in which we hold a heinous crime. Both that value and that horror change over time. In our modern culture we seem to be uncomfortable about considering these matters, and thus both proponents and opponents of execution fall back on "scientific" assertions about deterrence that are not only dubious but are likely to remain so. The quality of public debate would be substantially improved if all sides recognized this.¹⁸

Without going into the relevant issues here, it seems evident that the retributive theory of justice is not dead, but alive—and kicking.

3. *Alternatives to Justice.* Professor Kaufmann suggests that if we abandoned the idea of justice, we should lose nothing since other concepts are available to perform its legitimate functions. He is not interested, however, in merely substituting one word for another.¹⁹ Let us consider briefly some of the substitutes or surrogates which might be available.

Many writers associate justice with equality. But neither equality nor equality of opportunity would be acceptable to Professor Kaufmann since he unequivocally rejects both concepts. His position can be summarized in his own words:

Equality of opportunity is a slogan, and those who employ it are not really in favor of the means required to bring it about. Men are not equal. Men should not be made equal. And equality of opportunity is either a hollow cliché or a pernicious goal.

My claim that men are not equal and that equality is a myth does not entail any bigotry. . . . My point is that no two men or women are alike. . . . All men and women are brothers and sisters, and each should be considered as an individual. Giving the same to all is not particularly reasonable, seeing that they are not alike, do not have the same desires, and cannot all use the same things or opportunities.²⁰

The short answer to this contention is that the words "equal" and "equality" have various meanings. To say that one thing

¹⁸ Wilson, *The Death Penalty*, N.Y. Times, Oct. 28, 1973, § 6 (Magazine), 26, 48.

¹⁹ "[W]hat I object to is not so much the continued use of the words 'just' and 'justice' as it is a way of thinking that affects the way people behave. . . . Invocations of justice help to blind a moral agent to the full range of his choices. Thus they keep people from realizing the extent of their autonomy." KAUFMANN 93-94.

²⁰ *Id.* 85.

equals another thing may mean that the two things are alike. But more often it means that despite dissimilarities they are equivalent in worth or value. We say "like as two peas," not "equal as two peas." On the other hand, when exchange rates are quoted between different currencies we say that so many francs are "equal" to so many British pounds or so many American dollars, meaning simply that a balance can be struck between them.

Which sense of "equality" is employed in the historic claim that all men are created equal? Obviously the second, not the first. Nobody has ever seriously claimed, I think, that all human beings are exactly alike; differences in stature, disposition and capacities are too evident to be ignored. The doctrine of equality means rather that all individuals are *equal in worth despite differences in status or abilities*. Some historians have traced this conception, which is not found in all cultures, to the Judaeo-Christian view that all souls are equally precious in the sight of God.

Whatever its origin, equality of opportunity is clearly predicated upon the view that all men are *not* alike. To find out which man can run the fastest we start all competitors together. If we give the prize to the winner, it is because we consider it fitting to reward the special capacity he has demonstrated in winning. Indeed it seems plain that if all individuals were regarded as alike—if they were seen as fungible units interchangeable with one another for all purposes—the ideals of equality and equality of opportunity would never have arisen.

If these ideals are open to objection, it is either on the ground that they have not been fully achieved, or on the theory—now being advanced by some writers—that it is unjust to discriminate against incapacity. Professor Kaufmann has no patience with this last view, and in this I think he is right. But he is mistaken in accepting the premise on which it rests, *i.e.*, that equality means likeness in all respects, and that justice, therefore, precludes the recognition of individual differences. If this were the case, justice might operate as an obstacle to the moral autonomy of the individual, as Professor Kaufmann claims. But it is not the case. The ideal of equality does not deny individual differences, but presupposes them, and looks for ways by which they can be allowed to emerge without denying the intrinsic worth of every individual *qua* human being.

This point is especially important because current discussions of the possible connection between racial inheritance and particular capacities seem to be frequently infected by the same error. Suppose it were established that a statistical correlation exists between racial origin and certain intellectual or physical abilities. Suppose that racial group *A* is found to have, *on the average*, a higher intellectual competence than group *B*, while

group *B* has, *on the average*, greater athletic capacity than group *A*. Would such findings (if made) justify any conclusions about individual members of either group? Clearly not. Presumably there are many individual members of group *B* with very high intellectual capacities and many members of group *A* with very high physical capacities. The ideal of equality, which applies to individuals and not to groups, demands that every member of either group should be treated solely on his or her individual merits without regard to statistical generalizations of any sort. Prejudice and bigotry get a foothold when this is forgotten and when equality is mistakenly interpreted as implying universal likeness. I repeat: the ideal of equality presupposes individual differences; hence the assertion that differences exist—whether among individuals or between groups of individuals—does not discredit the ideal but confirms its importance.

In any case, since Professor Kaufmann rejects the concept of equality, he could not accept it as a surrogate for the concept of justice if the latter were eliminated. Would *fairness* serve the purpose? Evidently not. While Professor Kaufmann accepts the concept of fairness, he asserts quite categorically that fairness and justice are different, and he specifically attacks Professor Rawls for his recent attempt to develop a conception of justice as fairness.²¹ According to Professor Kaufmann, "[F]airness is pre-eminently a quality of procedures and not of results . . . , while 'just' is pre-eminently a predicate ascribed to results and specifically to what is meted out."²² This seems to involve a distinction without a difference. On whatever basis we may choose to distinguish between "substantive" laws and "procedural" rules, the fact remains that no substantive principles are automatically self-executing or self-applying; rules of procedure are always implicated in the actual determination of concrete cases. It follows that any determination of the justice of the "results" of any litigation must take account of the procedural aspects. Whether we speak of "fairness" or "justice," the two aspects cannot be separated—much less opposed—as suggested by Professor Kaufmann, for the reason that procedures affect substantive results. Thus if a man were sentenced to prison without a fair trial, we should consider the result unjust, not because we necessarily believe him innocent but because we believe that his guilt was not properly established. I think that Professor Olafson (to choose one example) was closer to the truth when he observed that, "More specifically, it would seem that even bad rules can be applied justly and good rules in an unjust way; and that justice is more a matter of procedural

²¹ See J. RAWLS, *A THEORY OF JUSTICE* (1971).

²² KAUFMANN 69.

fairness to individuals than of the substantive rightness or wrongness of the rules themselves."²³ And Professor Stone is surely correct in noting that the idea of "due process" historically acquired substantive implications only as a consequence of its originally procedural functions.²⁴ In short, Professor Kaufmann seems mistaken. The fact remains, however, that for Professor Kaufmann, fairness and justice are so different that the former could not be accepted as a substitute for the latter.

We come to *honesty*, which Professor Kaufmann seems to regard as the best candidate for replacing justice. He points out correctly that scrupulous honesty in observing and applying the prescribed rules would serve many of the ends of justice. Would it cover all of them? What about punishing the innocent? Professor Kaufmann discusses this point, arguing that honesty would prevent our punishing for a breach of the law a person who had not in fact broken it.²⁵ But suppose the law itself provided that children were to be punished for the crimes of their ancestors, or that innocent hostages might be punished if any acts of violence occurred in their communities? Laws and customs of this sort have actually existed. We resist such laws and customs, I think, because we have come to regard them as fundamentally unjust. In such cases, an appeal to honesty would be irrelevant. Here we come up against the same inadequacy in Professor Kaufmann's concept of justice which was noted earlier: he fails to recognize that the concept of justice can serve as a ground for challenging the validity of laws and systems of law. In this connection he talks of "inhumanity," asserting that laws can be inhumane, *e.g.*, the laws of England which prescribed execution for petty theft. I think we can readily agree that such laws were indeed inhumane. The question remains whether so vague a concept would give any guidance in less dramatic situations. Could an arbitrary system of taxation, for example, be attacked (except rhetorically) as inhumane? I think not.

I note in this connection that while Professor Kaufmann argues that the idea of justice should be dispensed with, there are some passages which seem to suggest that we are nevertheless entitled to speak of injustice.²⁶ He also suggests that though we can never say absolutely what people deserve, we can say in some cases what they do not deserve, *e.g.*, capital punishment for petty theft.²⁷ I find such suggestions puzzling. If the concept of justice is "decrepit," can the concept of injustice be any less so? If desert is incalculable, how can we calculate what is undeserved?

²³ F.A. OLAFSON, *SOCIETY, LAW AND MORALITY* 6 (1961).

²⁴ See J. STONE, *HUMAN LAW AND HUMAN JUSTICE* 90-91 (1965).

²⁵ KAUFMANN 133.

²⁶ *Id.* 86.

²⁷ *Id.* 68.

Without pursuing the inquiry further, I think I have said enough to indicate why Professor Kaufmann's analysis of justice leaves me as firmly unconvinced as his discussion of decidophobia—and this despite the fact that I admire his conception of moral autonomy. At the same time, he makes certain incidental observations which seem to me profoundly important. They deserve to be followed up.

As to the *formal* concept of justice, that like cases should be treated alike, Professor Kaufmann notes that this is a necessary but not a sufficient condition of material justice.²⁸ This is entirely correct. In practice, the crucial question is what similarities and differences are to be taken as relevant. On this point, Professor Kaufmann observes that, "Ultimately every attempt to spell out a material conception of justice involves a decision as to the kind of society we want. It requires a decision about goals and standards."²⁹ This also seems to me correct. But what follows? Professor Kaufmann concludes merely that moral rationalism is wrong because the "moral rationalist takes his standards for granted and refuses to consider alternatives."³⁰ It seems to me that the point goes far deeper. As Professor Kaufmann observes elsewhere, "Many disputes about justice . . . are ultimately disputes about different visions of society and the future one desires for humanity."³¹ If this is the case, then justice cannot be the kind of simplistic concept he takes it to be. Debates about justice or equality always involve underlying decisions—often masked behind theories of cognitive intuition—about goals, standards, norms and ideal visions of man and society. Such decisions are of at least two kinds. One kind involves the application of established or accepted norms and laws to concrete cases; they are necessary because no law (whether descriptive or prescriptive) is self-applying. Hence the need for courts and judges. The other kind of decision involves the critique of the accepted norms and laws themselves. As Professor Kaufmann recognizes, we criticize a given set of norms and standards by appealing to another set, but even the ultimate set is tentative and provisional.³² In the background there is always a judgment stipulating or postulating the ideal possibilities of man and society.

There is an increasing convergence of opinion, I believe, toward this conception of the matter. But if one takes seriously a view of this sort, it follows that the concept of justice must be recognized as itself subject to evolution and development. As the

²⁸ *Id.* 85-86.

²⁹ *Id.* 80.

³⁰ *Id.* 80-81.

³¹ *Id.* 89.

³² *See id.* 187.

individual grows toward increasing autonomy, the problem of harmonizing his personal needs and aspirations with those of his neighbors and those of society at large—and ultimately with those of other men and other societies—becomes increasingly complex. It is here that justice finds its field of operation. For the autonomous man must still live in a world of other men, with whom he must be prepared in some degree to come to terms. Although Professor Kaufmann attacks the Golden Rule as “intolerable”³³ the problem of reciprocity remains. Rules of law and morals are needed, as Professor Kaufmann concedes. Hence there is also need for a continuing critique of laws and legal systems in the interests of the kind of autonomy and liberation for which Professor Kaufmann so eloquently calls.

It remains to say a word about the idea of *guilt*. Professor Kaufmann argues powerfully against *guilt feelings*, which he regards as constricting and destructive. But he also insists on the importance of a sense of responsibility and a sense of fault. He draws a set of distinctions between two kinds of feelings which he describes as past-oriented and future-oriented, as follows:

<i>past-oriented</i>	<i>future-oriented</i>
guilt	fault
remorse	regret
contrition	humblition [his term for a blend of humility and ambition]
self-accusation	self-criticism
wallowing	planning ³⁴

Those feelings listed in the first column are to be shunned and put aside, while those in the second column are to be cultivated and developed. Some of the distinctions are subtle, such as that between remorse and regret, but I shall not discuss that aspect of the matter. More important for present purposes is the fact that, in condemning guilt, Professor Kaufmann does not distinguish sufficiently between subjective guilt (*i.e.*, guilt feelings) and objective guilt (*i.e.*, the *factual* determination that something forbidden has been done). He assimilates the two on the theory that guilt in either sense implies that the guilty party deserves to be punished. As previously pointed out, though he accepts punishment as necessary for the enforcement of law, he insists that no punishment is ever deserved since desert is incalculable.

This raises a serious problem, with which Professor Kaufmann does not deal. Suppose we reject the retributive theory of punishment and adopt a wholly “future-oriented” attitude, holding that punishments are warranted only to deter future wrong-

³³ *Id.* 188.

³⁴ *Id.* 123.

doing. Suppose a law is passed to the effect that whoever is convicted of grand larceny shall be sentenced to jail for a specified term. Suppose further that the prison term is fixed solely with reference to its deterrent effect (assuming that this is calculable). What is the effect of such a law? According to Kelsen's analysis (which I find persuasive) the effect of such a law is to generate an *ought*—or more precisely a cluster of *oughts*. If an act of larceny occurs, the law officers are obligated to proceed in certain ways—*i.e.*, to catch the offender. And the citizens are also obligated—*i.e.*, they ought not to commit larceny. These duties are legally established. They may or may not coincide with the moral sense of the community, but this fact is irrelevant for present purposes. The point is that laws backed by sanctions generate obligations. Now if a man violates an obligation—if he does what he ought not to do—then the notion of guilt is introduced, at least in the objective sense. The wrongdoer may have no guilt feelings; he may feel no remorse, but only regret for having been caught. But a finding that he did in fact commit the act prohibited, however that finding may be phrased, is necessarily a finding of objective guilt. And it also establishes that under the law he deserves the prescribed penalty.

I do not see how these consequences can be avoided. If Professor Kaufmann had considered the problem of obligation, I think he might have come to different conclusions about the concept of desert, with which obligation is intimately connected.

It seems to me that as long as there are laws with penal sanctions, objective determinations of guilt and desert are inevitable. Professor Kaufmann goes part way toward recognizing this when he suggests that it was originally the imposition of stipulated rewards and punishments which generated the idea of desert.³⁵ I think this is probably correct.³⁶ But Professor Kaufmann does not seem to see the full implications of this suggestion; he treats it as further proof of the irrationality of the ideas of guilt and desert, and the need to be rid of them. I would suggest, on the contrary, that it shows the impossibility of escaping from the ideas of desert and guilt as long as there are rules of conduct backed by sanctions.

As to guilt feelings, there is a parallel question: Can guilt feelings be eliminated as long as there are felt obligations? Does the autonomous man feel obligations of any sort? I should assume so, since Professor Kaufmann says he would have a "social conscience."³⁷ But if he feels obligations, must he not also feel guilty (in some sense) if he violates a felt obligation? There is

³⁵ See, e.g., *id.* 101-04, 107.

³⁶ Cf. P. RICOEUR, *THE SYMBOLISM OF EVIL* (1967).

³⁷ KAUFMANN 130.

a problem here which remains unresolved, since Professor Kaufmann says nothing, as far as I can discover, on the subject of moral or legal obligation. This omission reflects, I think, a tendency to vagueness about the concept of responsibility.

To summarize briefly, I find Professor Kaufmann's concept of moral autonomy important, original and challenging. But his arguments on guilt, justice and equality are unpersuasive. They do not do justice—if the word is permissible—to his other work, which I greatly admire.

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